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Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1625

# In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL G. GORMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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20 pp

## QUESTIONS PRESENTED

1. Whether a public official who receives lucrative offers of future employment and unsecured loans in return for the performance of an official act has received "anything of value" within the meaning of the illegal gratuity statute, 18 U.S.C. 201(g).

2. Whether the proof at trial varied from the indictment in a way that prejudiced petitioner.

3. Whether the evidence was sufficient to support petitioner's conviction for participating as a public official in a matter in which he had a conflict of interest.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 807 F.2d 1299.

### JURISDICTION

The judgment of the court of appeals was entered on December 23, 1986. A petition for rehearing was denied on February 6, 1987 (Pet. App. B1). The petition for a writ of certiorari was filed on April 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of participating in a matter in which he had a conflict of interest, in violation of 18 U.S.C. 208(a), and on one count of receiving illegal gratuities, in violation of 18 U.S.C. 201(g). He was sentenced to concurrent terms of a year and a day in prison. Pet. App. A1.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A5). In brief, the evidence showed that in late 1982 and early 1983 petitioner solicited personal loans and a lucrative offer of employment from co-defendant Merle Weber while petitioner served as an Economic Crime Specialist and an Assistant United States Attorney in the Office of the United States Attorney for the Northern District of Ohio. The evidence also showed that Weber had a substantial financial interest in an investigation petitioner was conducting at the time and that petitioner provided Weber with confidential information about the investigation.

During proceedings involving the bankruptcy of James Hartley, information came to light that implicated Hartley and several banks in a check-kiting scheme. Petitioner was the lead prosecutor investigating that scheme, an assignment he performed between August 1982 and April 1983. Co-defendant Merle Weber was a creditors' representative who had been retained in connection with the Hartley bankruptcy by a number of Hartley's creditors under an agreement that would have paid Weber 10 percent of the funds recovered by those creditors. During the time he represented the creditors, Weber

became of the opinion that Hartley had engaged in a massive check kiting and illegal bank stock transfer scheme with several banks. Weber concluded that if the scheme could be proved, it could result in a recovery of $12.5 million for the creditors, which would produce a $1.25 million fee for Weber. Pet. App. A2.

In the summer of 1982, Weber sought to enhance his leverage over the banks against which the creditors had potential claims by augmenting his efforts with the threat of a criminal investigation. It was Weber's hope that the potential liability and attendant publicity of a criminal proceeding would stimulate the banks to settle quickly with the creditors. To that end, Weber met with petitioner and urged that he institute a criminal investigation of various banks and individuals associated with Hartley. Petitioner indicated that he would pursue the case. Shortly after that initial meeting, petitioner prepared a document listing the persons involved in the Hartley matter and the charges that could be brought against them, and he forwarded the document to Weber. Petitioner also kept Weber apprised of the grand jury proceedings in the Hartley case and discussed, among other things, how to time grand jury subpoenas to put extra pressure on the banks to settle Weber's claims. Pet. App. A2-A3.

On at least two occasions—shortly after their initial meeting and again in February 1983—petitioner discussed his prospects for employment with the creditors' representative business that Weber and his assistant, Christine DeSanctis, planned to establish with the proceeds from the Hartley case. At a meeting in DeSanctis's apartment in August 1982, petitioner told DeSanctis that, as a condition of employ-

ment, he would require a guarantee in advance of two years' salary—a total of $300,000. That money, petitioner said, should be placed in an escrow account, with the funds to be provided either by Weber or by two Hartley creditors who faced potential criminal liability. Petitioner added that if the money were provided by the creditors, then petitioner's report on the Hartley case would discourage prosecution of those creditors. Petitioner repeated his demands to Weber in February 1983. Weber allowed petitioner to believe his conditions would be met. When petitioner pressed the issue, however, Weber stalled. The two eventually had a falling out on March 30, 1983. The Hartley criminal investigation was closed, without ~~construction~~ prosecution of the banks, in April 1983. Pet. App. A3-A4.[1]

Throughout the period that he worked on the Hartley matter, petitioner experienced severe financial difficulties, including a $25,000 cost overrun in the construction of a new residence. In early November 1982, petitioner agreed to accept a $25,000 loan from Weber. When Weber failed to produce the funds by Christmas 1982, petitioner flew unannounced from Toledo, Ohio, to Phoenix, Arizona, to demand the money personally. Weber was in Montana at the time, and petitioner eventually reached him by telephone. Petitioner told Weber he needed $2,000 that day to pay his contractors' bills and that if he did not

[1] Petitioner's discussions with DeSanctis and Weber about future employment were not limited to those two occasions. As the court of appeals noted (Pet. App. A3), petitioner frequently broached the subject of working for the creditors' representative business that Weber and DeSanctis proposed to establish and suggested that his position with the United States Attorney's office gave him access to information that would be of great benefit to that venture.

receive the money he would lose his job and the Hartley investigation would be closed. On December 27, 1982, Weber arranged for $2,000 in cash to be taken from the account of the Chairman of the Board of the People's Bank of McComb, Ohio, and to be delivered to petitioner's wife at a motel in Findlay, Ohio. The evidence showed that this transaction was structured as a loan from the bank chairman to Weber for the purpose of making a loan to petitioner. On December 28, 1982, a loan in the amount of $3,500 was made to petitioner using a similar procedure. Pet. App. A4.

On January 3, 1983, petitioner demanded an additional $10,000 from Weber, again under the threat that petitioner would lose his job and the Hartley investigation would be closed if petitioner did not receive the money. Weber again called the bank chairman and arranged for petitioner immediately to receive a $10,000 unsecured personal loan from the McComb bank.[2] Pet. App. A4.

2. Petitioner challenged his convictions on a number of evidentiary grounds. The court of appeals affirmed (Pet. App. A1-A11).

a. With regard to the conflict of interest count, the court of appeals rejected each of the four challenges petitioner raised to the sufficiency of the evi-

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[2] Petitioner subsequently repaid Weber and the bank with interest (although without late fees) on May 6, 1983. In order to do so, he obtained a loan from the Huntington Bank in Toledo under stringent conditions and financial monitoring procedures required by the bank: petitioner had to encumber his residence with a third mortgage, destroy his credit cards, develop a financial recovery plan for periodic review by the bank, attempt to sell his house, and arrange for his wife to return to work. Pet. App. A5.

dence.[3] First, the court concluded that the evidence showed that, during the relevant period, petitioner was "negotiating * * * concerning prospective employment" within the meaning of the statute. The court observed (Pet. App. A6) that while petitioner was investigating the Hartley matter, he met separately with DeSanctis and Weber and on each occasion furnished a "list of his conditions for taking employment with Weber." The court concluded that "[t]his in itself is clearly enough evidence for the jury to conclude beyond a reasonable doubt that [petitioner] had been 'negotiating' with Weber for employment" (*ibid.*).

The court also rejected petitioner's claim that any negotiations that may have taken place occurred only after the Hartley investigation ended. The court observed (Pet. App. A6-A7) that petitioner and DeSanctis first spoke about prospective employment in August 1982, that petitioner discussed the same subject with Weber in February 1983, and that the Hartley investigation was not closed until April 1983.

The court similarly rejected the proposition that Weber had no financial interest in the outcome of the criminal investigation into Hartley's financial affairs. The court concluded that Weber's 10 percent contingent fee arrangement with Hartley's creditors entitled the jury "to find that Weber stood a real possibility of sustaining financial gain or loss as a

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[3] The federal conflict of interest statute, 18 U.S.C. 208(a), prohibits any officer or employee of the Executive Branch from participating in any matter or proceeding "in which, to his knowledge, he, * * * or any person or organization with whom he is negotiating * * * concerning prospective employment, has a financial interest * * *."

result of [petitioner's] official actions" (Pet. App. A7). Finally, the court found the evidence sufficient to show that petitioner knew that Weber stood to benefit from the Hartley investigation. The court stated (*id.* at A8) that petitioner "kept Weber and DeSanctis fully apprised of confidential grand jury activity" in the case and "repeatedly threatened Weber with the ruin of the criminal investigation of the banks if he did not immediately receive loans" (*ibid.*).

b. The court also rejected petitioner's challenges to his conviction for receiving illegal gratuities.[4] It found no merit to petitioner's claim (see Pet. App. A9) that only cash or cash equivalents fall within the scope of the statutory prohibition and therefore that the loans and promises of future employment he solicited did not constitute "anything of value" within the meaning of the statute. The court observed (*ibid.*) that there is no authority for petitioner's narrow reading of the statute and that in order to serve the purpose of the statute, "the term 'thing of value' must be broadly construed." Relying on *United States* v. *Williams*, 705 F.2d 603, 623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983), the court held that "the value which the defendant subjectively attaches to the items received" is relevant for purposes of determining whether such items are "anything of value" under the statute (Pet. App. A9).

The court then turned to the particular "things" petitioner solicited from Weber—loans, which he ultimately repaid, and an offer of future employment.

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[4] The federal gratuities statute, 18 U.S.C. 201(g), prohibits a public official from directly or indirectly soliciting or receiving "anything of value for himself for or because of any official act performed or to be performed by him."

Both of those benefits, the court concluded, are "things of value" under the statute. The loans in question constituted "things of value" because, unlike the loan petitioner later obtained from a commercial bank, the loans from Weber were obtained on extremely short notice, were unsecured, and contained none of the strict conditions that were imposed in connection with the commercial loan. As the court of appeals stated, "the numerous conditions of the [commercial] loan * * * strongly indicate that [petitioner] could not have received substantial unsecured loans at all, much less on extremely short notice. The receipt of such loans from Weber therefore would have had an objective, as well as a subjective, value to [petitioner]" (Pet. App. A9).

The court also concluded that Weber's offer of a job was a "thing of value." The court rejected petitioner's argument that "any compensation received would have been for additional duties performed" (see Pet. App. A10), observing that petitioner's salary as an employee of Weber's would have been three times his government salary and that one of the conditions of his employment with Weber was that he remain with the United States Attorney's office and that he "us[e] that job, in part, to refer cases to Weber" (*ibid.*). The court further concluded that, "[c]onsidering [petitioner's] precarious financial situation," an offer of future employment would clearly have been valuable to petitioner (*ibid.*).

The court similarly found no merit to petitioner's challenge to the sufficiency of the evidence showing that he performed an "official act" in exchange for receiving a thing of value. As the court stated, "[w]ith respect to the loans, * * * [petitioner] repeatedly threatened Weber that his investigation of

the Hartley bankruptcy would end if he did not receive the loans he requested" (Pet. App. A10). Likewise, with respect to the offer of employment, the court concluded that the offer was in connection with an "official act" because it was contingent upon petitioner's remaining an Assistant United States Attorney and thereby "referring Hartley-type cases to Weber" (*ibid.*).

Finally, the court rejected petitioner's claim that a variance existed between the indictment and the proof at trial. Petitioner argued (see Pet. App. A11) that the indictment charged him with receiving loans from Weber totaling $23,000, when in fact Weber lent him only $13,000, with the remaining $10,000 coming from the People's Bank of McComb, Ohio. But the court of appeals noted that the indictment charged petitioner with receiving a total of $23,000 in loans "directly and indirectly" from Weber, and the evidence established that those loans petitioner did not receive directly from Weber he received indirectly, since it was Weber who arranged the $10,000 unsecured loan from the McComb bank (*ibid.*).

## ARGUMENT

1. Petitioner renews (Pet. 13-33) his claim that he did not receive "anything of value" from Weber within the meaning of 18 U.S.C. 201(g), and he asserts that the decision of the court of appeals to the contrary conflicts with decisions of other courts of appeals. Specifically, he claims that every other court that has considered the issue has concluded that to violate Section 201(g), a government official must solicit or receive compensation additional to his official salary "in the forms of gifts or gratuities for [his] official acts * * *" (Pet. 14 (emphasis omit-

ted)). Petitioner's attempt to limit the reach of the statute, however, is unsupported by the case law upon which he relies.

Petitioner correctly notes (Pet. 18-19, 23-24) that several courts of appeals have described Section 201 as prohibiting the receipt by public officials of "additional compensation or a tip or gratuity for or because of an official act." *United States* v. *Irwin*, 354 F.2d 192, 196 (2d Cir. 1965). See *United States* v. *Brewster*, 506 F.2d 62, 72-73 n.26 (D.C. Cir. 1974) (Section 201 prohibits *inter alia* the payment to "an official [of] a sum which he is not entitled to receive"); *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.), cert. denied, 439 U.S. 870 (1978) (Section 201 "reach[es] any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position"). But each of those cases involved a defendant who made cash payments to public officials. Those courts did not conclude, or even suggest, that the scope of Section 201 is limited exclusively to cash payments. Instead, each court recognized—as did the court of appeals in this case (see Pet. App. A9)—that Section 201 casts a larger net. Thus, in *Evans*, the Fifth Circuit noted that Section 201 is to be "broadly construed" (572 F.2d at 480). Accord *United States* v. *Williams*, 705 F.2d 603, 623 (2d Cir.), cert. denied, 464 U.S. 1007 (1983). And in *Brewster*, the District of Columbia Circuit noted only that Section 201 is "primarily," but not exclusively, concerned with cash payments (506 F.2d at 72 n.26). See also *United States* v. *Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986), cert. denied, No. 85-2031 (Oct. 14, 1986) (a "thing of value" is "not limited * * * to tangible things with an identifiable commercial price

tag").[5] As the loans and job offer were plainly things of value to petitioner, the court of appeals did not err in affirming his conviction under Section 201(g).[6]

2. Petitioner contends (Pet. 37-51) that the evidence at trial on the gratuity count varied from the indictment in three respects: (1) the evidence established that Weber directly lent him $13,000 and arranged for an additional bank loan of $10,000, but the indictment failed to charge him with receiving the proceeds of loans "*arranged* through * * * Weber" (*id.* at 38 (emphasis in original)); (2) the prosecu-

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[5] The other cases cited by petitioner (Pet. 14) do not help him at all. In *United States* v. *Umans*, 368 F.2d 725, 728 (2d Cir. 1966), the court merely stated that the gratuities statute requires proof "that payment was made to an agent in a situation where no payment was necessary"; nothing in the court's opinion suggests that the gratuity (or "payment") must be in cash or a cash equivalent. *United States* v. *Niederberger*, 580 F.2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978), and *United States* v. *Hare*, 618 F.2d 1085 (4th Cir. 1980), do not address the issue; to the extent that they are pertinent at all, they support the analysis of the court of appeals, as both cases involved gratuities other than an outright gift of cash—a golfing trip in one case and a loan under favorable conditions in the other.

[6] Petitioner suggests (Pet. 33-37) that the court of appeals failed to locate evidence in the record establishing that he sought the loans or the employment offer "for or because of any official act performed or to be performed by him." This claim is frivolous. The court of appeals found clear evidence of petitioner's unlawful intent in the fact that he "threatened Weber that his investigation of the Hartley bankruptcy would end if he did not receive the loans he requested" and agreed to remain in the government "while working with Weber at least in part for the purpose of referring Hartley-type cases to Weber" (Pet. App. A10).

tion introduced evidence that petitioner solicited bribes from certain investigative targets, yet it failed to charge him with accepting bribes in violation of 18 U.S.C. 201(c) (Pet. 42-46); and (3) the evidence showed that petitioner negotiated with both Weber and DeSanctis, while the indictment charged him with negotiating only with Weber (*id.* at 46-51).

Petitioner failed to raise the latter two variance claims below, and he is therefore foreclosed from raising them in this Court for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, all three claims are entirely lacking in merit.

Petitioner's first contention was answered by the court of appeals. The court noted that the indictment charged petitioner with "'directly and indirectly * * * receiv[ing] things of value from * * * Weber, that is, loans totaling $23,000'" (Pet. App. A11). The evidence at trial, moreover, established that Weber directly lent petitioner $13,000 and indirectly provided an additional $10,000 by arranging for petitioner to receive that sum from a bank immediately, and without posting any security (see *id.* at A4).

The remaining contentions—which petitioner did not raise below—are equally unfounded. First, he claims that the prosecution introduced evidence that he solicited a bribe, yet charged him only with what he characterizes as the lesser included offense of soliciting and receiving a gratuity. The evidence to which he points in support of this claim is DeSanctis's testimony that petitioner said that his requested

annual salary of $150,000 could be paid either by Weber or by two Hartley creditors who faced potential criminal liability (see Pet. App. A3). But this evidence was surely probative of petitioner's guilt on the gratuity charge. And, while the evidence also might have been probative if petitioner had been charged with bribery,[7] that does not diminish its admissibility to establish, as one element of the gratuity charge, that petitioner, with criminal intent, solicited the employment offer from Weber and DeSanctis "for or because of any official act * * * to be performed by him" (18 U.S.C. 201(g)).[8]

Petitioner's remaining claim of variance is similarly without support. He asserts that while the indictment charged him with negotiating concerning future employment exclusively with Weber, the evi-

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[7] The federal bribery statute, 18 U.S.C. 201(c), imposes criminal liability on a government official or employee who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value" in return for "being influenced in his performance of any official act."

[8] If, despite his characterization of this contention as a claim of "variance," petitioner instead means to argue that the probative value of the evidence was outweighed by the danger of unfair prejudice (see Rule 403, Fed. R. Evid.), that argument, which in any event is incorrect, is also foreclosed by the record in this case. The evidence that petitioner now protests was admitted at trial without objection (see Tr. 20-21) and was the subject of cross-examination (*id.* at 79-80). Petitioner did not challenge the evidence in the court of appeals.

Similarly, if petitioner means to suggest that there is a possibility the jury was confused about the precise charge against petitioner, that contention would be fully answered by the district court's instructions to the jury. Those instructions (Tr. 1242-1247), which petitioner did not challenge below, clearly and correctly defined the elements of an illegal gratuity offense.

dence at trial established that he negotiated with DeSanctis as well. The indictment charged that "[d]uring the period August 1982, through April 1983, [petitioner] was negotiating concerning prospective employment with Merle C. Weber." The evidence at trial established that DeSanctis worked for Weber, that she and Weber together approached petitioner for the first time on August 10, 1982, in an effort to persuade him to expedite his investigation of the Hartley matter, and that DeSanctis subsequently told petitioner that she and Weber planned to form a business together (see Pet. App. A2-A3). The evidence also established that petitioner and DeSanctis first discussed petitioner's future employment on August 27, 1982, and that they did so with the understanding that the decision whether to employ petitioner was Weber's (*id.* at A3). The evidence therefore conformed to the indictment and established that petitioner negotiated for future employment beginning in August 1982 and that he did so with Weber or with someone acting on Weber's behalf.[9]

3. Petitioner renews (Pet. 51-64) his challenge to the sufficiency of the evidence supporting his conflict of interest conviction. This factbound claim is entirely lacking in merit and does not warrant further review.

Petitioner suggests (Pet. 51-54) that even if Weber had a "financial interest" in the banks petitioner investigated, the Hartley investigation was concluded in January 1983, and that petitioner and

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[9] In any event, petitioner fails to show how he could have been prejudiced in any way by the asserted variance. See *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985).

Weber did not negotiate concerning future employment until February 1983. Hence, he asserts, he was not properly convicted on the conflict of interest count, as he did not, within the terms of Section 208(a), "participate[] * * * in a * * * proceeding" at any time during which, "to his knowledge * * * any person * * * with whom he [was] negotiating * * * concerning prospective employment, ha[d] a financial interest * * *." Even were it true, as petitioner claims, that his investigation terminated in January 1983, he still would properly have been convicted under Section 208, as his first negotiations about prospective employment with Weber commenced in August 1982.[10] In any event, petitioner's assertion that the investigation ended in January 1983 is incorrect, as the court of appeals concluded (Pet. App. A6-A7). The evidence at trial established that while Hartley agreed to plead guilty in January 1983, petitioner continued to debrief him, in an effort to collect evidence against creditors (including the banks in question), well after petition-

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[10] To the extent that petitioner contends that he was not engaged in "negotiation[s]" over future employment (see Pet. 46-49), he is clearly mistaken. Indeed, the discussions of petitioner's future employment with Weber resulted in an agreement by Weber to meet the conditions that petitioner had insisted on as the terms of his employment (see Pet. App. A3-A4), which clearly constitutes "negotiation" under any construction of the term. The case on which petitioner relies, *United States* v. *Conlon*, 628 F.2d 150 (1980) (rev'g dismissal of indictment), 661 F.2d 235 (D.C. Cir.) (on appeal from conviction), cert. denied, 454 U.S. 1149 (1982), does not support his claim. That case held that the term "negotiating" in Section 208(a) must be given a "broad reading" consistent with its ordinary meaning, 628 F.2d at 155, which plainly encompasses the conduct proved in this case.

er's meeting with Weber in February 1983 (see Tr. 797-798, 1217-1218).[11]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
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JUNE 1987

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[11] Petitioner's related assertions that Weber had no "financial interest" in the Hartley matter (Pet. 55-63) and that even if Weber had a financial interest petitioner was unaware of it (*id.* at 63-64) are wholly without merit. The evidence plainly showed that Weber stood to gain up to $1.25 million if he persuaded the banks in question to settle their disputes with the trustee in bankruptcy and that the threatened criminal prosecution would have put enormous pressure on the banks to settle (see Pet. App. A2). Likewise, the evidence established that petitioner was well aware of Weber's financial stake in the matter; there was testimony that petitioner repeatedly threatened Weber that if the money petitioner demanded was not forthcoming, petitioner would scuttle his investigation of the banks and thereby diminish Weber's bargaining leverage.

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